92-932

No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term 1992

Leon C. Baker, Petitioner

v.

J.R. Bennett and Laura Bennett, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

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Date: November 20, 1992

QUESTIONS PRESENTED

1. Did an Alabama court's exercise of specific jurisdiction over a Floridian (a retired New York lawyer) based solely on unsolicited long distance telephone calls made from Alabama to him in New York violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

2. Was the Due Process Clause of the Fourteenth Amendment of the United States Constitution violated when an Alabama court exercised general jurisdiction over a Floridian (a retired New York lawyer) in a lawsuit by other Floridians, solely on the basis of the lawyer's representation six months earlier of an English client in a different transaction with different participants, two Alabamans, which was conducted entirely from New York by interstate and international correspondence and telephone calls?

3. Did an Alabama court's application of Alabama law to impose damages on a Floridian in an action by two other Floridians for alleged innocent misrepresentation and innocent nondisclosure in connection with a purchase of computers in England that

occurred in New York, when no liability existed under New York, English, or Florida law, violate the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV of the United States Constitution.

4. Did an Alabama court's exercise of personal jurisdiction over a nonresident based on unsolicited interstate telephone calls from Alabama to the nonresident in New York impose burdens on interstate commerce that violate the Commerce Clause of the United States Constitution?

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... v

OPINION BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

STATEMENT OF THE CASE..... 3

A. The Facts..... 3

B. The Federal Questions Presented For Review By This Court Were Raised In The Alabama Trial and Supreme Courts..... 11

REASONS FOR GRANTING THE WRIT..... 13

POINT I: ALABAMA'S EXERCISE OF SPECIFIC JURISDICTION OVER BAKER BASED ON NOTHING MORE THAN UNSOLICITED INTERSTATE TELEPHONE CALLS FROM ALABAMA TO BAKER IN NEW YORK VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT..... 17

TABLE OF CONTENTS (Continued)

POINT II: THE EXERCISE OF GENERAL JURISDICTION OVER BAKER BASED ON HIS REPRESENTATION OF AN ENGLISH CLIENT IN A SINGLE TRANSACTION WITH TWO ALABAMANS THAT WAS CONDUCTED ENTIRELY FROM NEW YORK AND WAS COMPLETELY INDEPENDENT OF THE TRANSACTION UNDERLYING THIS LITIGATION VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT..... 25

POINT III: ALABAMA'S APPLICATION OF ITS OWN LAW TO AWARD DAMAGES FOR INNOCENT MISREPRESENTATION AND INNOCENT NONDISCLOSURE, FOR WHICH THERE WOULD BE NO LIABILITY UNDER THE LAWS OF THE ONLY JURISDICTIONS HAVING A NEXUS WITH THE CLAIM, VIOLATED DUE PROCESS AND FULL FAITH AND CREDIT..... 30

POINT IV: ALABAMA'S EXERCISE OF JURISDICTION VIOLATED THE COMMERCE CLAUSE..... 35

CONCLUSION..... 38

TABLE OF AUTHORITIES

CASES

In re Aircrash Disaster at Gander Newfoundland, 660 F. Supp. 202 (W.D.Ky. 1987)..... 18

Allstate Ins. Co. v. Hague, 449 U.S. 302, 101 S.Ct. 633, 67 L.Ed.2d 623 (1981)..... 33

Asahi Metal Co. v. Superior Court of California, Solano County, 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed 2d 92 (1987).....13, 22, 24, 28

Atchison Topeka & Sante Fe R.R. Co. v. Wells, 265 U.S. 101, 44 S.Ct. 469, 98 L.Ed. 524 (1924)..... 37

Austad Co. v. Pennie & Edwards, 823 F.2d 223 (8th Cir. 1987)..... 14

Baker v. Baker, 111 Idaho 639, 603 P.2d 590 (1979)..... 18

Bennett v. Baker, 603 So.2d 928 (Ala. 1992)..... 1

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1002, (1959)..... 36

Brent v. American Basketball Association, 432 F. Supp. 71 (D.C. Mo. 1977)..... 14

Burger King Corp. v. Rudzewicz, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 529 (1985)..... 17

Caldwell v. Seaboard Sys. R.R., 238 Va. 148, 380 S.E.2d 910 (1989), cert. denied 493 U.S. 1095 110 S.Ct. 1169, 107 L.Ed.2d 1071 (1990) 18

Cartwright v. Braly, 218 Ala. 49, 117 So. 477 (1928)..... 31

Davis v. Farmers Cooperative Equity Co., 262 U.S. 312, 43 S.Ct. 556, 67 L.Ed. 996 (1923)..... 36

Derry v. Peek, 14 A.C. 337 (1888)..... 31

German Auto Inc. v. Tambrello, 565 So.2d 238 (Ala. 1990)..... 31

Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1283, 2 L.Ed.2d 1283 (1958).....17, 22

Helicoptoros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)..... 25, 26, 27, 29

Holfield v. Power Chemical Co., 382 F. Supp. 388 (D.Md. 1974)..... 18

Home Insurance Company v. Dick, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed.926 (1930).....32, 33

International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).....17, 21

Jonz v. Garrett Air Search Corp, 490 P.2d 1197 (Alaska 1971)..... 18

Kulko v. California Superior Court, 436 U.S. 84, 98 S.Ct. 1690, 53 L.Ed.2d 132 (1978)..... 20

Marchant v. Peeples, 623 S.W.2d 523 (Ark. 1981)..... 14

Mayes v. Leipziger, 674 F.2d 178 (2d Cir. 1982)..... 14

Michigan Central R.R. Co. v. Mix, 278 U.S. 492, 49 S.Ct. 207, 73 L.Ed. 470 (1929)..... 37

N.Y. Central R.R.Co. v. Johnson, 279 U.S. 310, 49 S.Ct. 300, 73 L.Ed. 706 (1929)..... 8

Pappas v. Middle Earth Condominium Assoc., 963 F.2d 534 (2d Cir. 1992)..... 9

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 268 (1985)..... 34

Rebozo v. Washington Post Co., 515 F.2d. 1208 (5th Cir. 1975)..... 18

Reliance Steel Products Co. v. Watson, Ess, Marshall, 675 F.2d 587 (3d Cir. 1982)..... 14

S.D. Leasing, Inc. v. Al Spain & Associates, 277 Ark. 178, 640 S.W.2d 451 (1982)..... 18

Southern Pacific Co. v. Arizona,
325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed.
1915 (1945)..... 36

Sperandio v. Clymer, 581 S.W.2d
377 (Mo. 1979)..... 14

State ex rel. Deere & Co. v. Pinnell,
454 S.W.29 889 (Mo. 1970)..... 18

Sutton v. Cast-Crete Corporation of
Florida, 197 So.2d 556 (Fla. 1967)..... 31

Ultramares v. Touche, 255, N.Y. 170, 174 N.E. 441
(1931)..... 31

Viereck v. U.S., 318 U.S. 236 63 S.Ct.
561, 87 L.Ed. 734 (1943)..... 8

Weber v. Mihalis, 633 F.2d 518
(8th Cir. 1980)..... 18

Worldwide Volkswagen Corp. v. Woodson,
444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d
490 (1980)..... 13, 20, 23, 28

Wright v. Yackley, 459 F.2d 287
(9th Cir. 1972)..... 14

UNITED STATES CONSTITUTIONAL PROVISIONS

Article I, §10.....34, 35

Article II, §8.....2, 35, 36

Article IV, §1.....2, 30, 32

Fourteenth Amendment.....2,..17, 25, 36

RULES AND STATUTES

28 U.S.C. 1257(3)..... 2

Rule 4.2(a)(2)(I), Alabama Rules of Civil Procedure.....3, 18

Rule 5, Alabama Rules of Appellate Procedure..... 11

Rule 59.1, Alabama Rules of Civil Procedure.....8, 12

Alabama Code §§6-5-101 through 6-5-103.....3, 31

Arizona Rules of Civil Procedure Rule 4.2(a)..... 18

California Code of Civil Procedure §410.10..... 18

District of Columbia Code §13-423..... 18

Illinois Statutes §2-209(c)..... 18

Kansas Statutes §6-308(11)..... 21

Louisiana Statutes §3201..... 18

Maine Statutes §704-A..... 18

Misrepresentation Act of 1967 §2I..... 31

Nebraska Statutes §25-536(2)..... 18

New Jersey Rule 4:4-5 Civil Practice Rules..... 18

North Dakota, Rule 4(h), Rules of Civil Procedure.. 18

Oregon Rule 4L, Rules of Civil Procedure..... 18

Pennsylvania Statutes §5322(b)..... 18

Rhode Island General Laws §9-5-33(a)..... 18

South Dakota Codified Laws §15-7-2(14)..... 18

Tennessee Code §20-2-214(a)(6)..... 18

Utah Code §78-2722..... 18

Vermont, Rule 4(e) Rules of Civil Procedure..... 18

Wyoming Statutes §5-1-107(a)..... 18

OTHER

4 Florida Jur. 566..... 31

Miller & Crump, *Jurisdiction and Choice of Law in Multi State Class Action after Phillips Petroleum Co. v. Schutts*, 96 Yale L.J.1..... 10

Misrepresentation Act of 1967, §2I..... 31

60 New York Jur.2d 570-71, 633-36..... 31

Restatement of Restitution §8 (1988)..... 31

Restatement (Second) of Contracts 424-25 (1986)..... 31

Street, Law of Torts, 386-87 (6th Ed. 1976)..... 31

12 Williston, Contracts, 400 (3d Ed.)..... 31

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

Petitioner Leon C. Baker ("Baker") prays that a Writ of Certiorari be issued to review the opinion and judgment of the Supreme Court of Alabama entered in these proceedings on July 24, 1992.

OPINION BELOW

The Alabama Circuit Court issued no opinion. The opinion of the Alabama Supreme Court is reported at 603 So.2d 928 (Ala. 1992) and is set forth at page A-6

of the Appendix. Petitioner applied to the Alabama Supreme Court for rehearing, which was denied without opinion.

JURISDICTION

The opinion of the Supreme Court of Alabama was entered on July 24, 1992. An application for rehearing was filed on August 7, 1992 and was denied on September 4, 1992. This Petition for a Writ of Certiorari was filed within 90 days of the denial. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law * * *.

Article IV, §1 of the United States Constitution provides in pertinent part:

> Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

Article II, §8 of the United States Constitution provides

in pertinent part:

> The Congress shall have Power* * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes * * *.

The statutory provisions involved are Rule 4.2(a)(2)(I), Alabama Rules of Civil Procedure and Alabama Code §§6-5-101 through 6-5-103, which are set forth at pages A-3 through A-5 of the Appendix.

STATEMENT OF THE CASE

A. The Facts[1]

This lawsuit arose out of a purchase in June 1981 by plaintiff, J.R. Bennett ("Bennett"), of an interest in computers located in England from Donald Gibbs, an Alabama resident, who is not a party to this action (or to the dispute between the parties). (C14-16) Plaintiff Laura Bennett is the wife of J.R. Bennett and filed joint federal income tax returns with him.

[1]The record in the Alabama courts has two parts, the reporter's record, a transcript of the trial proceedings, and the clerk's record, pleadings, motions, and other documents filed in the case. Citations to pages of the transcript are preceded by R (e.g., R32) and to the clerk's record by C (e.g., C34). Citations to the Appendix to this petition are preceded by A (e.g., A-21). Plaintiffs' exhibits are preceded by P (e.g., P21) and defendants' exhibits are preceded by D (e.g., D4).

In December 1980, six months before the resale to Bennett, the seller, Gibbs, and an associate, Johnny West, had purchased the computers from Atlantic Computer Leasing, p.l.c. ("Atlantic"), an English computer leasing company, and its Netherlands affiliate. Petitioner, Baker, a New York lawyer, had represented the two European companies in the sale to Gibbs and West.[2] (R102-03, 120-21, 843; PEx 2) When Gibbs resold half of his interest in the computers to Bennett, Baker's only relation to the transaction was the following:

> (i) In response to a telephone call initiated in Alabama by Bennett's accountants to Baker's New York law office, Baker ascertained that his English client would consent to the sale of part of Gibbs' interest to J.R. Bennett.[3]
>
> (ii) In a second long distance telephone call initiated in Alabama by Bennett's Alabama accountants to Baker's New York law office,

[2]As part of his representation, Baker formed a Delaware corporation, Coleman Leasing Corporation, to execute a non-recourse mortgage Gibbs and West were to take "subject to." (R276-77)

[3]The accountants also asked Baker whether the price Bennett was to pay Gibbs was fair. Baker said he believed it was. (R857)

Baker approved, on behalf of his English client, the proposed form of assignment from Gibbs to J.R. Bennett.

(iii) A copy of the executed assignment from Gibbs to Bennett was received by Baker in New York, which he then transmitted to his client in England.

(R172, 857-60) Baker sought no compensation in connection with any of the above and received none. (R869)

Bennett claims that there was a third long distance telephone call from his accountants in Alabama to Baker in New York, during which Bennett was handed the telephone and had a 30 second conversation with Baker. According to Bennett, Baker said that the purchase from Gibbs would give the Bennetts "a good tax shelter." (R487)[4]

[4]The Bennetts did not allege any prepurchase conversation with Baker in their complaint and they did not claim it as a contact with Alabama in opposing Baker's motion to dismiss for lack of personal jurisdiction over him. Bennett did not mention any such conversation in his pretrial deposition; nor did the Bennetts claim there was any prepurchase conversation in papers they filed opposing Baker's motion for summary judgment. The accountant who placed the call to Baker did not testify there was any such conversation. Bennett first mentioned this alleged prepurchase conversation at the trial. (R520-21, 785-86)

Nine years after the sale to Bennett and three years after all the parties had become residents of Florida,[5] the Bennetts instituted this action in an Alabama circuit court alleging that they had not received the tax deferrals they had anticipated from the purchase, because the IRS had disallowed deductions they had claimed.[6] (R169, 492, 781-83) The complaint was served on Baker in Florida.

The Bennetts originally advanced two theories against Baker. First, that Baker was acting as Bennett's lawyer in advising him of the tax consequences of the purchase from Gibbs and that Baker's opinion constituted professional malpractice. (C18) The Alabama trial court granted Baker a directed verdict dismissing that count. (R941) Second, Bennett contended that

[5]The Bennetts had become residents of Florida before the disallowance by the IRS. Petitioner became a resident of Florida on October 1, 1987, three years before the complaint in this action was served on him in Florida. The Bennetts became residents of Florida even earlier, but the date is not in the record.

[6]The Bennetts elected not to appeal the IRS' disallowances. Instead they settled on very favorable terms. They paid no penalties or enhanced interest, and the IRS left undisturbed deductions the Bennetts had taken for two of the six years for which they claimed losses on their computer investment. (R83, 93, 514, 578, 736-39, 745)

Baker's alleged "opinion" constituted intentional fraud. The trial judge initially granted a directed verdict on this count (R675), but she subsequently reinstated it based on Bennett's belated testimony at the trial as to the alleged 30 second telephone conversation.[7] (R942)

Baker submitted a 60 page memorandum of law showing that, even if he had proffered the 30 second gratuitous telephone opinion attributed to him, the Bennetts were not deceived, because his opinion was correct.[8] (C660-719) In addition, Baker urged that, since the accuracy of his opinion was a matter to be decided by the court, not the jury, the directed verdict dismissing the intentional fraud count should be reinstated. The Bennetts did not respond to the memorandum. The trial court, without adverting to the

[7]The Bennetts originally based their intentional fraud claim on a 31 page opinion Baker wrote to a third party, but they dropped that claim because that opinion was written almost two years after Bennett's purchase from Gibbs. (C14, 27-57) At that point, the Bennetts needed something to avoid a directed verdict. Bennett's tardy testimony concerning the alleged 30 second telephone conversation was a convenient *deus ex machina*.

[8]The legal conclusions of Baker's memorandum were concurred in by an expert witness at the trial, James Holden, Esq., former president of the Tax Section of the American Bar Association. (R238-65, 279-83, 292)

memorandum or the issues it raised, submitted the issue to the jury. (R941-942)

In closing argument, the Bennetts' counsel urged the Alabama jury to "stop lawyers in the biggest law firm in America," "New York lawyers," "from putting together abusive tax shelters," "costing the taxpayers 1.5 billion dollars a year." (R967, 977-978) Despite the persistent misconduct of the Bennetts' counsel -- even after the judge warned him that she would declare a mistrial if he continued to employ improper tactics -- Baker's mistrial motions were denied.[9] (R977-78)

The jury returned a general verdict in favor of the Bennetts for compensatory damages of $440,025 but awarded no punitive damages. (A-2) Baker moved for judgment notwithstanding the verdict or for a new trial or a remittitur. (C943-1018) The trial court never ruled on the three motions and, under Alabama Rule of Civil Procedure 59.1, they were deemed denied.

[9]In *New York Central R.R.Co. v. Johnson*, 279 U.S. 310, 319 (1929), this Court declared: "The public interest requires that the court of its own motion, as 2is its power and duty, protect suiters in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice." Id. at 318 The plaintiff had referred to the defendant as an "eastern railroad," and declared that records and witnesses had been "sent on from New York" for the trial. See also *Viereck v. U.S.*, 318 U.S. 236 (1943).

On appeal the Alabama Supreme Court held that Baker was not prejudiced by the pejorative references to him because the Bennetts' counsel used these arguments "primarily" in support of their punitive damages claim. Since the jury did not award punitive damages, the Court said, Baker was not prejudiced. (A-25) [10]

Although the case was tried on an intentional misrepresentation theory, the court below affirmed on an entirely different theory. It held that even though there was no evidence of any intentional misrepresentation or intentional omission to disclose relevant facts, the jury could have found Baker liable for innocent misrepresentation or innocent nondisclosure. (A-21-23) The parties had not addressed either of these theories in their trial or appellate briefs.

Since the Bennetts had been asserting only intentional misrepresentation, there had been no dispute over the applicable law. Alabama, New York, Florida, and England do not differ with respect to liability for

[10] A strikingly similar argument was rejected in *Pappas v. Middle Earth Condominium Ass'n*, 963 F.2d 534 (2d Cir. 1992).

intentional misrepresentation. But once the Alabama Supreme Court *sua sponte* changed the Bennetts' claim by holding Baker liable for *innocent* misrepresentation or nondisclosure, rather than for *intentional* misrepresentation, the governing law became critical. Alabama law differs from that of the other jurisdictions in allowing recovery for innocent misrepresentation and for innocent nondisclosure.[11]

Accordingly once the Alabama Supreme Court shifted the focus away from intentional fraud to innocent misrepresentation or innocent nondisclosure, it became necessary to consider what law was applicable. Baker sought reargument in order to brief this issue. By denying the motion, the Alabama Supreme Court declined to consider any law other than its own.[12] (A-28)

[11]Baker's innocent misrepresentation and innocent nondisclosure, if they occurred, took place in New York and, if they had any effect, it was in Florida. The "center of gravity" of the transaction was England, where the equipment was purchased, financed, leased, and located. The computers remained in England and there was never any intent to transport them to Alabama or anywhere else.

[12]Refusal to consider the application of law of other jurisdictions raises a more serious constitutional question than a mere error in choice of law. See Miller & Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 15 n. 109 (1986).

B. The Federal Questions Presented for Review By This Court Were Raised In The Alabama Trial and Supreme Courts.

Baker properly moved in the Alabama trial court to dismiss for lack of jurisdiction, citing rulings of this Court limiting the exercise of state court jurisdiction. (C120-26) Baker's motion was denied without opinion. (C267-68) Since the denial was interlocutory, under Alabama Rule of Appellate Procedure 5, Baker could not appeal without permission of the trial court, which declined to grant it.

Under Alabama law (as under federal practice), notwithstanding a preliminary determination of personal jurisdiction, the plaintiff must establish at trial the court's jurisdiction over the defendant. The Bennetts offered no proof on jurisdiction. Baker moved for a directed verdict upon completion of the Bennetts' case, but the Alabama trial court granted the motion only as to the professional malpractice claim.[13] (R941) Baker renewed his directed verdict motion at the close of all the evidence. The court reserved decision. In support of his post-trial

[13]The trial court held there was no evidence that Baker had acted as the Bennetts' lawyer. It did not discuss jurisdiction. R941

motions, Baker maintained that no evidence had been submitted that the trial court had jurisdiction over him. The court did not rule on Baker's motions within 90 days and they were deemed denied under Alabama Civil Rule 59.1.

In the Alabama Supreme Court, Baker pointed out that this Court has held that a state's long arm jurisdiction may be exercised only when the nonresident's alleged liability arises from the same forum contacts as provide the basis for jurisdiction. Nevertheless, the Supreme Court affirmed, holding that Baker was subject to jurisdiction in Alabama because of his participation as attorney for Atlantic in connection with its sale to Gibbs and West even though Baker's alleged liability to the Bennetts did not arise from that transaction. (A-19)

Baker's application for rehearing not only cited this Court's jurisdiction decisions but pointed out (a) that Baker was not subject to the jurisdiction of Alabama's courts because he represented his European clients in a different transaction with two different participants, (b) the error in applying Alabama law to hold him liable for innocent misrepresentation or innocent nondisclosure, and (c) that the jury's failure to award punitive damages did not cure the Bennetts' appeal to regional prejudice.

The Alabama Supreme Court denied rehearing. (A-28)

REASONS FOR GRANTING THE WRIT

This case reflects the dramatic change in the last 25 years in interstate and international business. Commerce formerly was concerned principally with goods and their transportation. Accordingly, many of this Court's precedents were designed to establish due process limitations on state court jurisdiction over nonresidents based on shipping goods into a state. See, e.g., *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) and *Asahi Metal Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987). Today a rapidly growing component of trans-border activity is the transmittal of information and services by various electronic means, and this case presents the Court with an opportunity to provide much needed guidance on the limits of state court jurisdiction based on communications and the movement of information services across state lines.

The need for guidance from this Court is reflected in the conflicting conclusions reached by various state and federal courts. A number of cases, like this one, have involved professionals who were sued in states

distant from those in which they practiced based on telephonic contacts with the forum state. Many courts have held that they did not obtain personal jurisdiction over nonresidents by virtue of telephone calls or even as a result of visits to the forum state in connection with out-of-state professional activities, such as litigation.[14] The case cited in note 14 are representative. There are many others. Contrary to these cases, the court below held that it had jurisdiction over Baker on the basis of three unsolicited telephone calls to him in New York

[14]The following cases are representive only: *Austad co. v. Pennie & Edwards*, 823 F.2d 223 (8th Cir. 1987) (New York patent lawyers not subject to suit in South Dakota by virtue of trip to client's office to inspect documents and "numerous phone calls between New York and South Dakota"); *Reliance Steel Products Co. v. Watson, Ess, Marshall*, 675 F.2d 587 (3d Cir. 1982) (Missouri law partnership not subject to suit in Pennsylvania based on advertisement in Martindale Hubbell Law Directory and unsolicited telephone call from Philadelphia); *Mayes v. Leipziger*, 674 F.2d 178 (2d Cir. 1982) (California lawyers who corresponded and had telephone calls with client in New York not subject to suit in New York); *Wright v. Yackley*, 459 F.2d 287 (9th Cir. 1972) (South Dakota doctor who furnished copy of prescription to patient who had moved to Idaho not subject to suit in Idaho for alleged injury from use of drug); *Brent v. American Basketball Association*, 432 F. Supp. 71 (D.C. Mo. 1977) (telephone calls to St. Louis by basketball team's agent recruiting player did not give Missouri jurisdiction over team's owner); *Marchant v. Peeples*, 623 S.W. 2d 523 (Ark. 1981) (Texas lawyer who had spoken on telephone several times with Arkansas client not subject to suit in Arkansas); *State ex rel. Sperandio v. Clymer*, 581 S.W.2d 377 (Mo. 1979) (en banc) (Utah medical specialist who exchanged correspondence with Missouri physician who sought his opinion not subject to suit in Missouri).

from Alabama or, alternatively, based on his professional representation of an English client (conducted entirely from New York by telephone and air mail six months earlier) in an entirely separate transaction with different parties having no connection with this lawsuit.

The present case provides this Court with an occasion to articulate the constitutional limits on personal jurisdiction over nonresidents based on the interstate transmission of information and information services. The importance of doing so is evidenced by the existing inconsistent precedents, the prevailing uncertainty, and the increasing frequency with which the issue arises.

This case is an excellent vehicle for doing so because it illustrates the grave potential for jurisdictional overreaching unless this Court establishes appropriate due process limitations. Baker did not initiate any of the interstate calls and he did not solicit any of them. Baker was not seeking, nor did he derive, any benefit from Alabama's laws. He was never in Alabama either in connection with his representation of his English client nor in connection with the transaction on which this case is based.

Nonetheless, the Alabama courts violated Baker's due process rights by impermissibly extending their jurisdiction to reach him. They violated his constitutional rights in two additional respects as well. They imposed liability on Baker under Alabama law for conduct and consequences elsewhere for which he would not have been liable in the relevant states and they permitted the plaintiffs to appeal to local prejudice against "New York lawyers" associated with "the biggest law firm in America."[15] These infirmities, coupled with the procedural rulings and nonrulings alluded to above present a glaring example of distant forum abuse. Finally, the cumulative effect of what occurred in the Alabama courts, if other courts follow suit, threatens the free flow of information and services throughout the nation and, therefore, unduly burdens interstate commerce.

[15]Based on the Alabama judgment, the Bennetts have garnished Merrill Lynch Pierce Fenner & Smith in Alabama, demanding that it turn over the securities in Baker's Florida account, which are exempt from execution in Florida, Baker's home state.

POINT I

ALABAMA'S EXERCISE OF SPECIFIC JURISDICTION OVER BAKER BASED ON NOTHING MORE THAN UNSOLICITED INTERSTATE TELEPHONE CALLS FROM ALABAMA TO BAKER IN NEW YORK VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This Court has held repeatedly that "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). To be subject to state court jurisdiction, a person must have "purposefully avail[ed himself] of the privilege of conducting activities within" that state. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity of another party or a third person.'" *Burger King*, 471 U.S. at 475 (citations omitted).

Alabama's jurisdiction provision, Alabama Rule of

Civil Procedure 4.2(a)(2)(I), has the declared purpose of extending Alabama's jurisdiction over nonresidents to the limits permitted by the United States Constitution.[16] Alabama pushed far beyond those limits in this case. None of the Constitutional requirements established by this Court for a state's exercise of jurisdiction over a nonresident was met. Baker never was in Alabama. He

[16]The importance of defining the constitutional limits on using interstate communication as a jurisdictional basis is evidenced by the fact that seventeen states and the District of Columbia have jurisdiction provisions comparable to Alabama's. Arizona Rules of Civil Procedure 4.2(a); California Code of Civil Procedure §410.10; District of Columbia Code §13-423; Illinois Statutes §2-209(c); Louisiana Statutes §3201; Maine Statutes §704-A; Nebraska Statutes §25-536(2); New Jersey Civil Practice Rule 4:4-5 North Dakota, Rule of Civil Procedure 4(b); Oregon Civil Procedure Rule 4L; Pennsylvania Statutes §5322(b); Rhode Island General Laws §9-5-33(a); South Dakota Codified Laws §15-7-2(14); Tennessee Code §20-2-214(a)(6); Utah Code §78-2722; Vermont, Rule of Civil Procedure 4(e); and Wyoming Statutes §5-1-107(a).

In addition, although the provisions of at least nine states are not as explicit as Alabama's, courts have held that the legislatures intended to go to the Constitutional limit. Alaska, *Jonz v. Garrett Air Search Corp*, 490 P.2d 1197 (Alaska 1971); Arkansas, *S.D. Leasing, Inc. v. Al Spain & Associates*, 277 Ark. 178, 640 S.W.2d 451 (1982); Florida, *Rebozo v. Washington Post Co.*, 515 F.2d 1208, 1212 (5th Cir. 1975); Idaho, *Baker v. Baker*, 111 Idaho 635, 603 P.2d 590 (1979); Kentucky, *In re Aircrash Disaster at Gander Newfoundland*, 660 F.Supp. 202 (W.D.Ky. 1987); Maryland, *Holfield v. Power Chemical Co.*, 382 F.Supp. 388 (D.Md. 1974); Minnesota, *Weber v. Mihalis*, 633 F.2d 518 (8th Cir. 1980), Missouri, *State ex rel. Deere & Co. v. Pinnel*, 454 S.W. 2d 889 (Mo. 1970) (en banc), and Virginia, *Caldwell v. Seaboard Sys. R.R. Inc.*, 238 Va. 148, 380 S.E.2d 910 (Va. 1989), cert. denied 493 U.S. 1095 (1990).

sent nothing into Alabama -- not even a single sheet of paper. Baker's limited activities relating to the Bennett purchase took place in New York. None of them were for Baker's benefit; they were solely to accommodate Bennett. Baker represented neither party to the sale and he did not participate in any of the negotiations. He neither sought nor received any legal fee or other benefit from the transaction.

Baker's conduct was entirely in New York. Baker did nothing purposefully directed toward Alabama. He did not need, invoke, or receive the protection or benefit of Alabama's laws, and that state had no constitutionally legitimate interest in providing a forum for this dispute, which is entirely between Floridians.

At the request of Bennett's accountants, made in a long distance call from Alabama to Baker's New York law office, Baker inquired of his English client whether it would object to the proposed transfer of half of Gibbs' interest to Bennett. In a second long distance telephone call from Bennett's accountants to Baker's New York law office, he approved -- again on behalf of his English client -- the form of assignment Gibbs and Bennett proposed to use. Finally, Bennett's accountants mailed

a copy of the assignment to Baker's New York office, which Baker simply transmitted to his client in England.

Even assuming (a) that there was a third long distance telephone call initiated by Bennetts' accountants before the purchase from Gibbs and (b) that Baker gratuitously indicated he thought the purchase would provide the Bennetts with "a good tax shelter," the fact remains that the call was unsolicited and was to Baker in New York. Finally, even assuming the opinion were erroneous, it caused no effect in Alabama, which is required to permit that state to exercise jurisdiction. See *Kulko v. California Superior Court*, 436 U.S. 84 (1978). Any adverse effect was in Florida, where the Bennetts resided when they were assessed by the Internal Revenue Service.

If Baker can be haled before the Alabama courts simply because he answered his telephone and discovered an Alabama caller on the line, there is no substance left to this Court's statement in *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) that:

> [W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we

> and remain faithful to the principles of interstate federalism embodied in the constitution* * *.

If Alabama can obtain jurisdiction over a nonresident merely because telephone calls were made to him from Alabama, state boundaries have been rendered irrelevant and there are no practical limits on a state court's jurisdiction.[17]

If a nexus with a state as tenuous as the unsolicited telephone calls in this case suffices, it will enable suits to be brought against nonresidents in distant forums without regard to "traditional notions of fair play and substantial justice," which this Court has said is impermissible. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The burden on out-of-state citizens then can be compounded, as is graphically highlighted in this case by the Alabama court's application of domestic law to impose liability that would not have existed in any of the

[17]Kansas Statutes §60-308(11) makes a nonresident subject to suit in the state if the nonresident contracts for "communication services" when the services are managed, operated, or monitored in Kansas if the nonresident is put on reasonable notice that so contracting may result in extension of jurisdiction. Sprint Communication Company's terms and conditions for Massachusetts subscribers cites the statute and states that the customer "may be subject to jurisdiction in Kansas for any dispute relating to your telephone service with Sprint."

relevant jurisdictions and its toleration of the Bennetts' resort to local prejudice against Baker as a "New York lawyer" associated with the "biggest law firm in America." See Points III and IV, below.

This Court's decisions establishing a constitutional limit on state court jurisdiction were disregarded by the Alabama courts. In *Hanson v. Denckla*, 357 U.S. 235 (1958), this Court said:

> [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the protection of its laws. (Id. at 253)

This Court added that the benefit to a defendant of taking advantage "of the privilege of conducting activities within the forum state" must be "meaningful and beneficial." Clearly these requirements were not met with regard to Baker.[18] The Alabama Supreme Court also failed to honor *Asahi Metal Co. v. Superior Court of*

[18]Far from being protected by or benefitting from Alabama's law, Baker had thrust upon him Alabama's unique laws with respect to liability for innocent misrepresentation and innocent nondisclosure. See Point III, below.

California, Solano County, 480 U.S. 102 (1987). This Court held that a Japanese manufacturer could not be subjected to suit in California even though it apparently was fully aware that approximately 20,000 of its valve assemblies, when incorporated in tires by a Taiwanese manufacturer, would "end up" in California annually. Unlike this case, which involves at most three telephone calls, all initiated by the plaintiffs in a distant state regarding a single transaction, in *Asahi* there was a continuous flow of tires containing the defendant's valves into California. Nonetheless, this Court said:

> The "substantial connection" * * * between the defendant and the forum state necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum state*. (emphasis in original) (Id. at 112)

Also ignored by the court below was the requirement that the defendant must reasonably have anticipated being sued in the forum state. In *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the purchaser of an automobile in New York, who had an accident while driving it in Oklahoma, was not permitted to maintain a

product liability suit in Oklahoma against the New York retailer and the distributor for New York, New Jersey, and Connecticut. This Court stated:

> [T]he foreseeability which is critical to due process is not the mere likelihood that a product will find its way into the forum State. Rather it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. (Id. at 297)

The Alabama courts totally ignored the constitutional limitations on state court jurisdiction established by this Court. Certiorari should be granted not simply to correct this error, but also to provide much needed guidance to all state courts as to the proper construction of this Court's declared limitations on state court power over nonresidents by defining more precisely the meaning of "minimum contacts," "purposefully avails," "meaningful and beneficial," and "reasonably anticipate being haled into court" in the context of interstate communications and information services.[19]

[19]Since interstate communications are part of the nation's "stream of Commerce," and questions of jurisdiction in that context were left in a state of considerable confusion by the multiple opinions in *Asahi*, certiorari should be granted to provide clarity in this important area of jurisdiction law.

POINT II

THE EXERCISE OF GENERAL JURISDICTION OVER BAKER BASED ON HIS REPRESENTATION OF AN ENGLISH CLIENT IN A SINGLE TRANSACTION WITH TWO ALABAMANS THAT WAS COMPLETELY INDEPENDENT OF THE TRANSACTION UNDERLYING THIS LITIGATION VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Perhaps implicitly recognizing that the telephone calls to Baker, standing alone, would not be a sufficient basis for exercising personal jurisdiction, the court below held that Alabama had jurisdiction over Baker because of his representation of an English client in the Gibbs and West purchase. That transaction, however, was completely separate from the sale by Gibbs to Bennett and was completed six months prior to the alleged innocent misrepresentation and innocent nondisclosure involved in this action.

The court below did not specify whether it was holding that Alabama had general or specific jurisdiction over Baker. Whichever the court may have intended, however, it is clear that neither existed. In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984),

this Court pointed out the critical distinctions between general and specific jurisdiction.

When a claim does not arise out of the defendant's forum activities, an action may be maintained against him or her only if the court has general jurisdiction. That requires the defendant's forum activities to be continuous and systematic -- for example, regularly doing or soliciting business in the state. When the defendant's forum contacts are isolated or sporadic, the court cannot assert general jurisdiction; it can invoke specific or long arm jurisdiction only if the claim arises from those contacts.

Helicopteros was a wrongful death action in Texas against a Colombian corporation arising out of a helicopter accident in Peru. The defendant provided helicopter service for oil and construction companies in South America. The decedents were United States citizens employed by a Texas consortium. The Colombian corporation's contacts with Texas were significantly greater than Baker's with Alabama. At the consortium's request, the Colombian company's chief executive flew to Houston to negotiate the service contract. The Colombian company had purchased a very

large percentage of its helicopter fleet in Fort Worth. On a number of occasions it had sent pilots, maintenance employees, and executives to Texas for training. Despite these activities this Court held that Texas did not have general jurisdiction over the Colombian corporation, because they were not continuous and systematic.

It follows that Baker's role in the Gibbs and West purchase also was not "a contact of a 'continuous and systematic' nature." Id. at 416. Baker never went to Alabama. He was not a party to the sale, merely a lawyer representing an out-of-state client. Not even his client was present in Alabama. Baker drafted sale and leaseback agreements relating to equipment located in England in his New York office. His only contact with Alabama was sending the agreements there for signature on behalf of his English client. Gibbs and West returned the partially executed agreements to New York to be forwarded for execution by Baker's clients in Europe.

Specific jurisdiction was not considered in *Helicopteros* because the parties had agreed that the accident in Peru had not arisen out of the Colombian

corporation's contacts with Texas. Nor could it have existed. This Court had held in *Shaffer v. Heitner*, 433 U.S. 186 (1977), that a state cannot exercise long arm jurisdiction unless the plaintiff's claim arose out of defendant's contacts with the state.

True, had there never been a Gibbs and West transaction, Gibbs' sale to Bennett never would have occurred. But this Court has not permitted use of a "but for" theory for jurisdiction.

> If the Japanese valve manufacturer had not sold valves to the Taiwanese tire manufacturer for insertion in tires that might be sold in California, the motorcycle accident is *Asahi* never would have taken place.
>
> If the tri-state dealer had not sold the automobile to the New York retailer, who sold it to the owner, who drove it to Oklahoma, the owner would not have been injured in the Oklahoma accident in *Worldwide Volkswagen*.
>
> If the Colombian corporation had not purchased helicopters in Texas and trained its pilots and maintenance personnel in Texas, the

crash in Peru in *Helicopteros* might never have occurred.

Yet in all of those cases the state could not exercise specific jurisdiction. Similarly, if Gibbs and West had not purchased computers from the English company, Gibbs would not have resold them to Bennett. As this Court's precedents demonstrate, however, that cannot be a basis for specific jurisdiction over Baker with regard to an action arising from Bennett's purchase from Gibbs.

Certiorari should be granted to correct the Alabama Supreme Court's unconstitutional assertion of general jurisdiction over Baker. Beyond that, the decision below demonstrates the continued confusion among state courts as to the distinctions between, and constitutional limitations on, general and specific jurisdiction. This case provides this Court with an excellent opportunity to clarify the differences between the two and the constitutional standards applicable to each of them, which the Alabama courts declined to honor.

POINT III

ALABAMA'S APPLICATION OF ITS OWN LAW TO AWARD DAMAGES FOR INNOCENT MISREPRESENTATION AND INNOCENT NONDISCLOSURE, FOR WHICH THERE WOULD BE NO LIABILITY UNDER THE LAWS OF THE ONLY JURISDICTIONS HAVING A NEXUS WITH THE CLAIM, VIOLATED DUE PROCESS AND FULL FAITH AND CREDIT.

Alabama's assertion of jurisdiction to adjudicate a dispute between Florida residents did not merely cause defendant great inconvenience and needless expense. It changed the substantive rights of the parties and altered the case's outcome. If the action had been tried in England, which was the transaction's center of gravity, in Florida, where all the parties reside and the alleged damages were incurred, or in New York, where the alleged innocent misrepresentation or innocent nondisclosure occurred, Baker would not have been liable. Under statutes peculiar to Alabama, however, Baker has been ordered to pay the Bennetts $440,025.

In most jurisdictions, including England, New York, and Florida, damages cannot be recovered for innocent misrepresentation or innocent nondisclosure. Under the

general common law rule,[20] therefore, Bennett's only available relief would have been to rescind his purchase from Gibbs.

Alabama uniquely defines "legal fraud" to include misrepresentations "made by mistake and innocently." Ala. Code §6-5-101. Its courts have held that the characterization of innocent misrepresentation as "legal fraud" permits the aggrieved party not only to rescind but to recover damages to the same extent as for actual fraud (except that punitive damages are not permitted). *Cartwright v. Braly*, 218 Ala. 49, 117 So. 477 (1928); *German Auto Inc. v. Tambrello*, 565 So.2d 238 (Ala. 1990).[21]

[20]See *12 Williston, Contracts* §1500 at 400-12 (3d ed. 1970), *Restatement of Restitution* §8 (1988); *Restatement (Second) of Contracts* 424-25 (1986). Florida: 14 Florida Jur. 566, *Sutton v. Cast-Crete Corp. of Florida*, 197 So.2d 556 (Fla. 1967); New York: 60 New York Jur.2d 570-71, 633-36, *Ultramares Corp. v. Touche*, 255 N.Y. 170, 186, 174 N.E. 441, 447 (1931); England: Street, *Law of Torts* 386-87, (6th ed. 1976), Misrepresentation Act of 1967 §2I, *Derry v. Peek*, 14 A.C. 337 (1888).

[21]The Alabama statute also defines a tort of "suppression," which consists of a failure to disclose what one is legally obligated to disclose. Ala. Code §6-5-102. The obligation can arise from a fiduciary or confidential relationship or under some circumstances from superior knowledge. Even though the definition of suppression does not include nondisclosure made by mistake and innocently, the Alabama Supreme Court held that innocent nondisclosure did constitute suppression in this case.

Since *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930), it has been settled that due process prohibits a state from applying its domestic law to a controversy having no relation to the state other than that an action was brought there.[22] In *Dick*, this Court reversed the application of Texas law in a Texas suit against American reinsurers of a Mexican insurance company to recover for a fire loss in Mexico, stating:

> All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of re-insurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance. At all times here material, he was physically present and acting in Mexico. Texas was, therefore without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in

[22]There was no full faith and credit issue in *Home Ins. Co. v. Dick*, because the relevant law was that of Mexico.

> payment of the imposed obligation violates the guaranty against deprivation of property without due process of law. (Id. at 408)

The Alabama courts not only completely disregarded the dictates of *Dick* but they ignored this Court's mandate in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 313 (1981), that "for a state's substantive law to be selected in a constitutionally permissible manner, the state must have significant contact or significant aggregation of contacts, creating state interests, such that choice of law is neither arbitrarily nor fundamentally unfair." In *Allstate* the forum's law could be applied because the plaintiff resided in that state. She was suing on policies that insured the life of her husband, who had worked in the forum state for many years before his death.[23]

There was no comparable nexus with Alabama in this case. The Bennetts were Floridians at the time the IRS assessed them, and when they served Baker three years later. Any representation or failure to disclose by Baker was in New York. Baker had no reason to believe

[23]Before the husband's death, the couple had lived in an adjacent state a short distance from its boundary with the forum.

that, because he had received an unsolicited telephone call from Alabama, he was subject to a body of law so much at odds with that of New York and Florida.

Nor is the opinion below reconcilable with *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), which reversed the application of Kansas law to the claims of out-of-state plaintiffs in a nationwide class action. This Court said:

> Kansas must have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests," in order to ensure that the choice of Kansas law is not arbitrary or unfair. *Allstate*, 449 U.S., at 312-313. Given Kansas' lack of "interest" in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits. (Id. at 821)

Nothing offends "traditional notions of fair play and substantial justice" more deeply than imposing liability retroactively for an act or omission the law did not proscribe when it was done. The states were prohibited from passing *ex post facto* laws by Article I, Section 10

of the Constitution even prior to the adoption of the Bill of Rights. Yet this effectively is what a state court does when it applies its law to an act or omission that does not engender liability where it occurred.

Certiorari should be granted so this Court can make clear that what legislatures are prohibited from doing by Article I, Section 10 of the Constitution courts are equally prohibited from doing by the Due Process Clause of the Fourteenth Amendment.

POINT IV

ALABAMA'S EXERCISE OF JURISDICTION VIOLATED THE COMMERCE CLAUSE.

If unsolicited interstate communication can be the basis for jurisdiction and the automatic application of forum law, an individual businessperson, doctor, or lawyer is threatened by having to defend, and being subject to local law, in every distant forum from which he or she receives a telephone call, a facsimile transmission, or an electronic mail message.

That would be an intolerable burden on interstate commerce. This Court has held that even state laws that on their face do not discriminate against interstate commerce violate the Commerce Clause when the effect

is to inhibit or burden interstate commerce. *See, e.g., Southern Pac. Co. v. State of Arizona*, 325 U.S. 761 (1945); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

Permitting jurisdiction and choice of law to be based solely on unsolicited interstate telephone calls or other forms of communication dwarfs the burdens on interstate commerce in the cases cited. As early as *Davis v. Farmers Cooperative Equity Co.*, 262 U.S. 312 (1923), this Court recognized that subjecting a railroad to lawsuits in distant forums places an intolerable burden on interstate commerce in violation of the Commerce Clause. That Clause was applied to prevent the exercise of jurisdiction by states without regard to whether the Due Process Clause of the Fourteenth Amendment would have been applicable.[24] In *Davis* the Atchison Topeka & Santa Fe Railway did not operate in Minnesota but maintained an office there for soliciting business. In reversing a Minnesota judgment against the railroad, this Court said:

> But orderly, effective administration of justice clearly does not require that a

[24]This Court said: "Since we hold that the Minnesota statute as construed and applied violates the commerce clause, we have no occasion to consider whether it also violates the Fourteenth Amendment." 262 U.S. at 318.

> foreign carrier shall submit to a suit in a State in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not re-side. The public and the carriers are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost.* * * With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs, and unduly burdens, interstate commerce. Id. at 317.[25]

Surely the public's interest in avoiding unreasonable obstructions to and undue burdens on interstate communications is just as great today as its interest in avoiding obstructions or burdens on transporting goods was seventy years ago. If Alabama could exercise personal jurisdiction because of unsolicited telephone calls from Alabama by the Bennetts' accountants made to Baker in New York, why would a telephone call to a

[25]In *Atchison T. & S. F. Ry. Co. v. Wells*, 265 U.S. 101 (1924), this Court reached a similar conclusion when jurisdiction was obtained in a distant state by attaching freight cars and garnishing receivables from other railroads. In *Michigan Central R. R. Co. v. Mix*, 278 U.S. 492 (1929), the result was the same even though the plaintiff was a resident of the forum state, Missouri. The cause of action arose in Michigan.

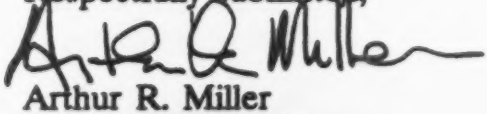
New York lawyer or doctor (or any other citizen) from a traveler passing through the Atlanta, Dallas, or Los Angeles airport not equally subject the recipient to suit in the courts of Georgia, Texas, or California? If so, could Georgia, Texas, or California then apply its own law to impose liability on the recipient, even though there would be no liability under the law of the state in which he or she lives or works?

The example differs only in degree from what was done below. Certiorari should be granted to alleviate the potential burden on interstate commerce imposed by the Alabama courts in this case and to prevent the ruling below from having precedential weight elsewhere.

CONCLUSION

For the reasons stated, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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No. _____

In the Supreme Court of the United States

October Term 1992

Leon C. Baker, Petitioner

v.

J.R. Bennett and Laura Bennett, Respondents

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ALABAMA

Arthur R. Miller
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Date: November 20, 1992

TABLE OF CONTENTS
OF APPENDIX

JUDGMENT APPEALED FROM.....A-1

ALABAMA STATUTES

§6-5-100..... A-3

§6-5-101..... A-3

§6-5-102..... A-3

§6-5-103..... A-4

OPINION OF ALABAMA SUPREME COURT... A-5

ORDER DENYING REHEARING..... A-29

JUDGMENT APPEALED FROM

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

J.R. BENNETT AND LAURA BENNETT,	)	
Plaintiff(s)	)	
v.	)	CIVIL ACTION NO. CV-89-384
LEON BAKER,	)	
Defendant(s).	)	

JUDGMENT ENTRY

THIS CAUSE came on for trial. The Plaintiff(s), J.R. Bennett and Laura Bennett were present and represented by counsel. The defendant(s), Leon Baker were present and represented by counsel. Issue was joined. The jury is duly impaneled, sworn and charged according to law and, after hearing the evidence, comes a jury of good and lawful men and women, to-wit, James C. Jackson, and eleven (11) others, who do say on their oath as follows:

> "We the jury find in favor of the Plaintiffs and against the defendant and assess Plaintiffs' damages as follows:

Compensatory (actual) damages $440,025 dollars
Punitive damages $ 0 dollars

It is our intention to assess total damages to the Plaintiffs at $440,025. dollars.

/s/ James C. Jackson
Foreperson

It is, therefore, ORDERED and ADJUDGED that the Plaintiff(s) J.R. Bennett and Laura Bennett, have and recover of the Defendant(s), Leon C. Baker, the sum of $440,025.00. Costs are taxed to the Defendant(s), for which let execution issue.

This the 20th day of June, 1991.

cc: John Haley
Tim Francis
Frank Noojin

/s/Jeri Blankenship
Jeri Blankenship
Circuit Judge

STATE OF ALABAMA IN THE CIRCUIT COURT
MADISON COUNTY CASE NO: CV-89-384

I, Billy D. Harbin, Clerk of the Circuit Court of Madison County, Alabama, hereby testify that this is a full, true and correct copy of the original record as the same appears of record and now on file in this office.

Witness my hand this the 25th day of June 1991.

/s/Billy D. Harbin
CLERK CIRCUIT COURT

ALABAMA STATUTES

§6-5-100 FRAUD - RIGHT OF ACTION GENERALLY

Fraud by one, accompanied with damage to the party defrauded, in all cases gives a right of action. (Code 1907, §2468; Code 1923, §5676; Code 1940, T.7, §107.)

§6-5-101 – MISREPRESENTATIONS OF MATERIAL FACTS

Misrepresentations of a material fact made willfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud. (Code 1907, §4298; Code 1923, §8049; Code 1940, T. 7, §108.)

§6-5-102. SUPPRESSION OF MATERIAL FACTS

Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case. (Code 1907, §4299; Code 1923, §8050; Code 1940, T. 7, §109.)

§6-5-103. DECEIT – RIGHT OF ACTION GENERALLY

Willful misrepresentation of a material fact made to induce another to act, and upon which he does act to his injury, will give a right of action. Mere concealment of such a fact, unless done in such a manner as to deceive and mislead, will not support an action. In all cases of deceit, knowledge of a falsehood constitutes an essential element. A fraudulent or reckless representation of facts as true, which the party may not know to be false, if intended to deceive, is equivalent to a knowledge of the falsehood. (Code 1907, §2469; Code 1923, §5677; Code 1940, T. 7, §110.)

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1992

1910384

Leon C. Baker

v.

J. R. Bennett and Laura Jean Bennett

Appeal from Madison Circuit Court
(CV-89-384)

STEAGALL, JUSTICE.

Leon Baker appeals from a judgment entered pursuant to a jury verdict for J. R. Bennett and his wife Laura Jean Bennett.

The Bennetts sued Baker, a tax attorney from New York; S. David Johnston, their personal accountant; and Johnston's accounting firm, alleging conspiracy to defraud, negligence, and malpractice. The Bennetts

claimed that the defendants had fraudulently induced them to invest in an improper tax shelter and that the fraud resulted in their payment of over $700,000 to the Internal Revenue Service ("IRS") in back taxes and interest.[1] Baker answered the Bennetts' complaint and asserted, among other things, that service of process was defective. Upon Baker's motion, the trial court quashed the purported service on Baker and gave the Bennetts 30 days to file an alias summons and complaint. The Bennetts complied; however, the record is silent as to whether service was ever completed. The Bennetts filed a second alias summons and complaint, which was properly served upon Baker. Baker filed a motion to dismiss, alleging that the trial court lacked personal jurisdiction over him; this motion was denied. Baker then petitioned this Court for a writ of mandamus to vacate the trial court's judgment on that motion, and this Court denied the writ. Baker subsequently filed a second answer to the Bennetts' complaint, and the Bennetts amended their complaint twice in response to

[1]The Bennetts' claims against Johnston and Johnston's accounting firm were settled; neither of those defendants is a party to this appeal.

the defenses raised.

Baker filed two motions for summary judgment, and both were denied. During the course of the subsequent jury trial, Baker moved for a directed verdict on all claims against him; his motion was granted as to the malpractice claim. The jury returned a general verdict against Baker for $440,025 in compensatory damages and no punitive damages. Baker moved for a judgment notwithstanding the verdict or, in the alternative, a new trial or a remittitur; that motion was denied by operation of law. Baker appeals.

The record reveals that the Bennetts owned a large interest in River Oaks Industries, a mobile home manufacturing business for which J. R. Bennett served as president and chief executive officer. Johnston was the Bennetts' personal accountant, as well as an advisor for many of the Bennetts' business interests. Baker was a business acquaintance of Johnston. J. R. Bennett had met Baker briefly in 1980 during a business meeting unrelated to this case.

In late 1980, the Bennetts were having difficulty paying the large income tax assessments on their

successful mobile home manufacturing business. Because the Bennetts sought to continue expanding the business and needed to maximize their cash flow, Johnston suggested that they invest in computer leasing as a tax shelter. Six months earlier, two of Johnston's clients had entered into a computer leasing arrangement recommended to Johnston by Baker. The clients had purchased computers and peripheral equipment from Atlantic Computer Leasing (hereinafter "Atlantic") for $4,128,473. Atlantic, an English corporation, is a large supplier of computer systems and specializes in arranged leases.

Baker had set up several of these transactions for Atlantic and had arranged the following plan involving two of Johnston's clients: IBM sold computers and equipment to two British entities, which entered into a leaseback arrangement with Atlantic. Atlantic then transferred the computers and equipment to Carena, Inc., its Dutch subsidiary, which resulted in tax advantages for the company due to certain provisions of Dutch tax law. Carena sold the equipment through a non-recourse mortgage to Coleman Leasing Corporation,

an intermediary entity set up by Baker for this purpose. Baker was the sole stockholder in Coleman Leasing and was, in fact, its attorney. The two clients then purchased the computers and equipment from Coleman Leasing for $586,034. Their interest was subject to the non-recourse mortgage of $3,629,039 held by Carena on its initial purchase of the computers from IBM; however, the clients had no personal obligation to pay this mortgage. The clients paid a total of $100,000 in cash, with the remainder to be paid in escrow to Coleman Leasing according to a 10-year structured payment schedule. From these funds, Baker was required to disburse the monthly payment on the principal due to Carena as well as fees for Carena's broker and his own legal fees. After executing the purchase agreement with Coleman Leasing, the clients immediately leased the computers back to Atlantic for a 10-year period. The amount of the clients' monthly purchase payment to Coleman Leasing was equal to the amount of Atlantic's monthly lease payment to them, so that no money actually changed hands each month. Under this arrangement, the clients could defer a certain amount of income tax for accelerated

depreciation of the computers and for deduction of interest on indebtedness incurred for acquisition of the computers. At the end of the 10-year lease period, Atlantic would have the option to repurchase the computers and equipment for a nominal amount, then sell them to less-developed countries that have a need for older model computers. This residual value of the computers is Atlantic's primary source of profit in computer leasing transactions.

Baker represented Atlantic in the lease arrangement with the two clients and prepared the contracts and promissory note documents necessary to execute the relationship between Atlantic, Carena, Coleman Leasing, and the clients. The clients were required to make their monthly payments to Atlantic through Coleman Leasing.

Don Gibbs, one of the two clients, subsequently sold his business and no longer needed the full amount of tax deferral generated by the computer leasing arrangement. Johnston then offered a one-half share of Gibbs's interest to the Bennetts, who were initially hesitant to invest in the rather complex transaction.

Although he was unfamiliar with all the intricacies of the shelter, Johnston urged the Bennetts to invest and even lent them most of the "up front" money that was necessary for them to do so. Johnston told the Bennetts that they would have to report as income the rents received from Atlantic on the equipment, but that the depreciation of the equipment over the first five years would far exceed this income and would be reported as a loss. The Bennetts could then, he said, defer payment of taxes equal to that loss. Johnston also told the Bennetts that Baker would defend him before the IRS if there were ever any problems with the leasing arrangement. The Bennetts thereafter purchased a one-half share of Gibbs's interest in the computers for $1,315,938, with payments to be made to Gibbs each month.

The Bennetts took state and federal tax deferrals relating to the transactions in their returns for 1981 through 1983. During those years, River Oaks Industries was being audited. In early 1985, prior to the filing of the Bennetts' 1984 tax return, the IRS notified the Bennetts that their personal tax returns would be

audited. The Bennetts were represented at the audit by one of Johnston's associates in his accounting firm. At the end of the initial audit in 1985, the IRS informed the Bennetts that it was challenging the validity of the computer leasing, but that it would not go forward on the matter until a decision was rendered in Coleman v. Commissioner, 87 T.C. 178 (1986), affirmed, 833 F.2d 303 (3d Cir. 1987), a case pending before the United States Tax Court at that time. Coleman involved a similar computer leasing tax shelter that had been set up by Baker, using Coleman Leasing as the intermediary. Baker was defending the taxpayer in Coleman.

Johnston discussed the audit with the Bennetts and advised them to do nothing until Coleman was decided. Johnston expressed great confidence in Baker's ability to win the case and assured the Bennetts that there was nothing to worry about. Accordingly, the Bennetts included the deferrals from the computer leasing deal in their 1984 tax returns, which were then added to the audit. The Bennetts retained a different accounting firm to prepare their returns in 1985 and 1986. Upon the advice of Gary Joyce, a member of Johnston's accounting

firm, the Bennetts' new accounting firm also included deferrals for the computer leasing in their tax returns for those years.

In a letter dated August 24, 1987, the IRS informed the Bennetts that the computer leasing deal was an "abusive" tax shelter. Specifically, the IRS determined that the computer equipment had been grossly overvalued, giving rise to inflated and fictitious losses. The IRS also questioned whether the computers and equipment ever actually existed, because the documentation relating to the computer leasing transaction did not contain serial numbers for the machinery. Based on these findings, the IRS assessed the Bennetts' back taxes, interest, and penalties totaling $1,200,000 for 1981 through 1984. The Bennetts immediately attempted to contact Baker in New York, but were unable to do so.

After retaining counsel, the Bennetts settled their state tax debt for $42,411.29 and their federal debt for $758,783.56. The IRS dropped its claim for penalties, because it determined that the Bennetts had relied on their advisors in investing in the computer leasing deal.

Baker raises several issues concerning the merits of the Bennetts' fraud claims against him; however, we first address his challenges to several procedural aspects of the case. Baker argues that the Bennetts' fraud claim is barred by the applicable statute of limitations as a matter of law and that the trial court erred in submitting the issue to the jury.

Under Ala. Code 1975, § 6-2-3, fraud actions are considered to have accrued upon the discovery by the aggrieved party of the facts constituting the fraud. Generally, the question of when a party discovered or should have discovered those facts so as to begin the running of the statutory period of limitations is one properly left to the jury. Hicks v. Globe Life & Accident Insurance Co., 584, So.2d 458 (Ala. 1991). The issue may be taken from the jury and decided as a matter of law only in cases where the plaintiff actually knew of facts that would put a reasonable mind on notice of fraud. Hicks, supra.

Based on the Hicks principle, Baker argues that the Bennetts' claim could have accrued at one of three different times: (1) when they received notice of the

IRS audit in 1985, (2) when the IRS gave notice in 1986 that it intended to disallow the computer leasing venture as a tax shelter, or (3) when the Coleman decision, which involved similar facts and the same type of shelter, was issued in 1986.

The first letter from the IRS that the Bennetts received did not indicate that the computer transaction was suspect, nor was it an assessment for the deductions taken on the transaction. It was merely notice of the pending audit, and the Bennetts turned the matter over to Joyce. There is evidence that the Bennetts knew in 1985 that the tax shelter might come under scrutiny; however, the record does not indicate that the Bennetts had grounds to suspect an underlying fraud at that point. Johnston and Joyce repeatedly assured them that the shelter would be upheld and continued to include the deferrals and deductions under the tax shelter in the Bennetts' 1984 and 1985 tax returns. The Bennetts thereafter retained new accountants to prepare their taxes and included the benefits of the tax shelter in their returns for those years.

The Bennetts had no contact with Baker during this

period, but were "guaranteed" by Johnston that the Coleman case would be resolved favorably and thereby would eliminate any doubts the IRS might have about the legitimacy of the tax shelter. The Bennetts did not know the details and intricacies of Coleman, and there is no evidence to indicate that they should have. The Bennetts did not graduate from high school and have no experience in tax or legal matters. In view of this fact, it does not appear unreasonable that the Bennetts would rely on the expertise and assurances of their accountant during the audit.

The record shows that the Bennetts did not know until 1987 that Coleman Leasing was controlled by Baker, that the computers and equipment might not exist at all, and that the value of those goods might have been grossly overvalued. It is those elements that formed the basis of the Bennetts' claims against Baker, not the mere knowledge that their returns were being audited or that the tax shelter could be disallowed. Upon their discovery of facts pertaining to Coleman Leasing and the valuation of the computers themselves, the Bennetts filed a timely complaint. In view of this, we conclude that the

Bennetts did not have actual knowledge of the alleged fraud until 1987, within two years of the filing of the complaint. Whether they should have discovered the fraud earlier was an issue properly submitted for the jury's determination. Hicks, supra.

Baker next argues that the Bennetts' action should not be deemed to have been filed in October 1988, because he was not served with process until July 1990. An action is not "commenced for purposes of the statute of limitations if it is not filed with the bona fide intention of having it immediately served." Mace v. Centel Business Systems, 549 So.2d 70 (Ala. 1989). Generally, the claim may be barred where the plaintiff has manifested a lack of intent to serve the defendant promptly after filing. Thompson v. E. A. Industries, Inc., 540 So.2d 1362, citing Ward v. Saben Appliance Co., 391 So.2d 1030 (Ala. 1980) (statute of limitations not complied with where plaintiff requested a delay in service of process after filing complaint). See, also, Pettibone Crane Co. v. Foster, 485 So.2d 712 (Ala. 1986) (failure to provide address of defendant was manifest evidence of intent not to promptly serve process).

The record shows that all other defendants in this case were served with process promptly after the filing of the complaint and that service was attempted on Baker. The service of process was sent by mistake to a law office located next to Baker's office in New York, and Baker testified at trial that a secretary in that office received it. Baker immediately acted upon this process by retaining counsel, who filed an answer and appeared at a deposition taken in 1989. He also filed a motion to quash service, which resulted in Baker's being properly served by a specially appointed process server. These facts certainly do not indicate any manifest lack of intent to promptly serve notice upon Baker; thus, we find no merit in this argument.

Baker next argues that the judgment against him is void because the trial court lacked in personam jurisdiction. In personam jurisdiction is proper if the defendant has such contacts with the state that maintenance of the suit does not offend traditional notions of substantial justice. Alabama Waterproofing Co. v. Hanby, 431 So.2d 141 (Ala. 1983). A party has sufficient contacts with the state of Alabama when that

person, acting directly or by agent, is or may be personally responsible as a consequence of that person's transacting business in this state. A.R.Civ.P. 4.2(a)(2)(A). The primary inquiry regarding personal jurisdiction is whether a defendant could have reasonably anticipated that the effects of his acts would be felt by the plaintiff in Alabama. Duke v. Young, 496 So.2d 37 (Ala. 1986).

The record shows that as an agent for Atlantic and as president of Coleman Leasing, Baker intentionally sent documents to this state to be executed by residents here, that he obtained promissory notes from Alabama residents that were payable at Alabama banks, that he mailed numerous items related to the computer lease transaction to this state, and that he accepted over $580,000 in cash payments from Alabama residents for Coleman Leasing. It is obvious that the repercussions of these acts would be felt by the Alabama residents involved; thus, we find no error in the trial court's conclusion that it had in personam jurisdiction over Baker.

We now turn to consider Baker's challenges to the merits of this case. He first contends that the trial court

erred in denying his motion for a directed verdict on the Bennetts' claims of intentional fraud and suppression. At trial, the Bennetts emphasized that the monthly payments they made to Gibbs for his share in the tax shelter were directed to Coleman Leasing. They claimed that Coleman Leasing was set up for Baker's own profit, with built-in kickbacks to Johnston. They further claimed that Baker and Johnston knowingly created a sham tax shelter and conspired to involve the Bennetts in the scheme in order to pump money into Coleman Leasing. They argued that both Johnston and Baker were guilty of suppressing material facts that would have led to the discovery of the purported fraud, and they accused Baker and Johnston of intentionally misleading them as to the facts underlying the leasing venture.

To prove suppression of a material fact, a plaintiff must establish (1) that the defendant had a duty to disclose that fact, (2) that the defendant concealed or failed to disclose that fact, (3) that the concealment or failure to disclose induced the plaintiff to act, and (4) that the action caused injury to the plaintiff, Ala. Code 1975, § 6-5-102. See, also, Gary v. Kirtland, 514 So.2d

970 (Ala. 1987). Section 6-5-102 does not require proof of an intent to deceive; rather, a breach of the defendant's duty to disclose the suppressed facts is sufficient to trigger liability. Burlington Northern R.V. v. Warren, 574 So.2d 758 (Ala. 1990). Under § 6-5-102, a duty to disclose arises either from a confidential relationship between the parties or from the particular facts and circumstances of the case. The question of the existence of a duty to communicate under § 6-5-102 is for the jury, which should consider the relationship of the parties, the value of the particular facts suppressed, and the relative knowledge of each party. Lowder Realty, Inc. v. Odom, 495 So.2d 23 (Ala. 1986). Where the defendant had superior knowledge of the suppressed fact and the defrauded party has been induced to take action that otherwise might not have been taken, the obligation to disclose is particularly compelling. Dominick v. Dixie Nat'l Life Ins. Co., 809 F.2d 1559 (11th Cir. 1987).

In this case, there is no substantial evidence of a confidential relationship between Baker and the Bennetts that would give rise to a duty to disclose the facts underlying the computer leasing venture. However, the

record shows that the Bennetts talked to Baker briefly by telephone in 1985, when they were in Johnston's office deliberating over whether to buy into the computer leasing venture. In that conversation, Baker stated that computer leasing was a "good tax shelter," but he did not reveal any of the underlying facts of the operation. It is undisputed that Baker had superior knowledge of the actual value of the computers and of the role of Coleman Leasing in the arrangement and also knew that these factors could be critical if the IRS questioned the tax shelter. It is likewise undisputed that the Bennetts relied on Baker and Johnston's expertise in entering into the venture.

In view of these facts, we cannot say that the trial court erred in submitting the issue of suppression to the jury. A directed verdict is proper only where there is a complete absence of proof on a material issue or where there are no disputed questions of fact on which reasonable people could differ. National Security Fire & Casualty Co. v. Vintson, 454 So.2d 942 (Ala. 1984). Here, there was evidence relating to the elements of fraud under § 6-5-102, and much of it was highly

controverted; thus, Baker's motion for a directed verdict was properly denied.

Likewise, we hold that the trial court did not err in failing to direct a verdict against the Bennetts' claim of fraudulent misrepresentation under § 6-5-101. Before a claim under this section may be submitted to the jury, the plaintiff must establish four elements of fraud: (1) a false representation (2) concerning a material existing fact (3) relied upon by the plaintiff (4) who was damaged as a proximate result. Cherokee Farms, Inc. v. Fireman's Fund Ins. Co., 526 So.2d 871 (Ala. 1988). A false representation, even if made by mistake or innocently, is a legal fraud and this section applies, entitling a plaintiff to compensatory damages. Morgan v. South Central Bell Tel. Co., 466 So.2d 107 (Ala. 1985). Where the evidence reasonably affords an inference that the plaintiff was defrauded by the misrepresentation, the case is one for the trier of fact. Hartselle Real Estate & Ins. Co. v. Atkins, 426 So.2d 451 (Ala.Civ.App. 1983).

Baker argues that the representation he made to the Bennetts, i.e., that computer leasing was a good tax

shelter, was not false at the time he gave it in 1981. At that point, the Coleman case had not been decided and the shelter had not been disallowed. Baker also correctly points out that the mere statement of an opinion is usually not a representation of material fact upon which an action for legal fraud can be based, particularly when there is no evidence of an intent to deceive. Reynolds v. Mitchell, 529 So.2d 227 (Ala. 1988). However, the Bennetts did not base their claim of misrepresentation solely on Baker's opinion of the tax shelter. The Bennetts also alleged that Baker first misrepresented the amount of money that would be directed through Coleman Leasing and then misrepresented the actual and residual value of the computers involved in the transaction. The record shows that the Bennetts' scheduled payments to Gibbs were channeled through Coleman Leasing for disbursal to Carena and the underlying parties in the transaction. Baker sharply disputed the impropriety of any of these disbursals, but was unable to produce a complete record of the money he allocated as the attorney in fact and sole shareholder of Coleman Leasing. Moreover, an expert witness for

the Bennetts testified that the value of the computers was considerably less than Baker reported it to be. While this testimony was rebutted with detailed evidence from Baker concerning the true value of the equipment, it was sufficient to create an inference of fraudulent misrepresentation.

Baker next argues that the trial court erred in failing to give certain jury instructions regarding the issues of suppression and material misrepresentation. The record shows that during the trial, the Bennetts' counsel sought to establish that Baker "pocketed" the funds paid into Coleman Leasing and that the underlying transaction was a sham. During closing argument, the Bennetts' counsel asked the jury to "Stop lawyers in the biggest law firm in America" and "New York lawyers" from putting together abusive tax shelters. Baker's counsel objected to these comments when they were made, and the trial court sustained the objections and gave curative instructions.

In a fraud case, counsel is given broad leeway in arguing the merits and is allowed in closing argument to comment on all proper inferences from the evidence

based on his own reasoning. Seaboard Coastline R.R. v. Moore, 479 So.2d 1131 (Ala. 1985). When an objection to an improper comment during argument is sustained and the trial court instructs the jury to disregard the remark, the test on appeal is whether the comment was so prejudicial that its effect was not or could not be eradicated from the minds of the jurors. Harrison v. Woodley Square Apartments, 421 So.2d 101 (Ala. 1982).

In this case, Baker insists that the statements made by the Bennetts' counsel inflamed the jury and resulted in an unreasonably high verdict. However, the statements in question were made primarily in counsel's attempt to win an award of punitive damages for the Bennetts. The fact that the jury declined to award even a small amount of punitive damages indicates that the statements made by the Bennetts' counsel did not unduly prejudice their minds against Baker. We therefore find the statements not so inflammatory as to warrant a new trial.

Baker next argues that the jury's award of $440,025 in compensatory damages was unsupported by the evidence and is, thus, due to be overturned. He

contends that this amount was computed based on the amount of taxes the Bennetts were required to pay to the IRS. Baker points out that the tax benefit to be gained from the computer transaction was a deferral, not a deduction, and that the Bennetts would have had to pay taxes to the IRS in any event. However, the amount of taxes paid to the IRS by the Bennetts is not the only element the jury could have considered in making its award. As previously discussed, there was evidence that the Bennetts paid an inflated amount for computer equipment that was grossly undervalued and then lost the residual value of the equipment. At trial, counsel for the Bennetts vigorously argued that this evidence should be a primary element in the jury's award of damages.

In reviewing a jury verdict, this Court must determine whether the evidence, viewed in the light most favorable to the plaintiff, was so preponderantly against the verdict as to be plainly and palpably wrong and unjust. Christiansen v. Hall, 567 So.2d 1338 (Ala. 1990). After examining the evidence contained in the record, we cannot say that it is so entirely against the verdict as to constitute plain error; therefore, in accordance with our

narrow standard of review, we must affirm the jury's determination of this issue.

The judgment entered by the trial court pursuant to the jury verdict is due to be affirmed.

AFFIRMED.

Hornsby, C. J., and Maddox, Shores, Adams, Houston, Kennedy, and Ingram, JJ., concur.

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
September 4, 1992

1910384

Leon C. Baker v. J. R. Bennett and Laura Jean Bennett

County: Madison Circuit Court No.: CV-89-384J

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

STEAGALL, J. - Hornsby, CJ., Maddox, Shores, Adams, Houston, Kennedy and Ingram, JJ., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 4th day of September, 1992.

S/Robert G. Esdale
Clerk, Supreme Court of Alabama